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IN THE

SUPREME COURT OF THE UNITED STATES

No. A-850

**76-6952**

JAMES JEROME ROYSTER,

Petitioner,

v.

THE STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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JAMES JEROME ROYSTER,

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v.

THE STATE OF OHIO,

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered December 27, 1976, rehearing denied January 20, 1977.

## CITATIONS TO OPINIONS BELOW

The opinions of the Supreme Court of Ohio are reported at 48 Ohio St. 2d 381 and attached as Appendix A.

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C., §1257 (3), petitioner having asserted below and asserting here deprivation rights secured by the Constitution of the United States.

## QUESTIONS PRESENTED

1. Is the Ohio Death Statute constitutional when a burden of proof is placed upon a Defendant to prove duress in a death case and no burden of proof is placed on a Defendant to prove duress in a mere incarceration case.

2. Are the Petitoner's equal protection rights denied when the trial court overrules his request for necessary funds to pay expert psychiatric witnesses in his mitigation hearing?

3. Are Sections 2903.01, 2929.03 and 2929.04 of the Ohio Penal Code in violation of the constitution of the United States?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the 5th, 6th, 8th and 14th Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Ohio law:

Ohio Revised Code, Section 2903.01. Aggravated Murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.
(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

Ohio Revised Code, Section 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.
(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict

shall separately state whether the accused is found guilty or not guilty of the principal charge and if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of seciton 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement,he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D)of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of Section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

Ohio Revised Code 2929.04 Criteria for imposing death or imprisonment for a capital offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assissination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, aommitted prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

## STATEMENT OF FACTS

This matter is on appeal from the Supreme Court of Ohio in affirming the actions of the lower Courts in finding the Petitioner guilty of one count of aggravated murder with specifications of aggravation.

Subsequent to the affirmance of the herein conviction, a Notice of Appeal was timely filed in the United States Supreme Court.

## HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief to the Ohio Supreme Court, Petitioner alleged error in overruling Petitioner's Motion to Strike Specifications of Aggravation and to limit imposition of sentence to life imprisonment; error in not suppressing the statement of the Petitioner; error in not finding that the offense of Petitioner was primarily the product of his mental deficiency; and error in denying Petitioner's request for necessary funds to pay professional witnesses. Each of these allegations was specifically rejected.

Petitioner's application for rehearing, in which the above mentioned contentions were again raised, was denied.

## REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE DEATH PENALTY STATUTE OF OHIO IS CONSTITUTIONAL WHEN A BURDEN OF PROOF IS PLACED ON A DEFENDANT TO PROVE DURESS IN A DEATH CASE AND NO BURDEN OF PROOF IS PLACED ON A DEFENDANT TO PROVE DURESS IN A MERE INCARCERATION CASE.

The petitioner was precluded presenting the defense of coercion or duress to the jury. The law will excuse a person when acting under coercion or compulsion for committing most, if not all crimes, except taking life of an innocent person. Nall v. Commonwealth, 208 Ky. 700, 271 SW 2d 1059. State v. Milam, 108 Ohio App. 254, 156 NE 2d 840, 843. Many states have statutes recognizing and defining the defense of duress, and the defense is generally considered applicable to all crimes except homicide. 40 ALR 2d, 908, 909.

Ohio passed a statute recognizing coercion or duress as a mitigating factor that the sentencing judge must consider before imposing death sentence. O.R.C. 2929.04(B)(2). It is plain that the doctrine of coercion is an affirmative defense. U.S. v. Stevenson, (CA7 Ill.),471 F.2d 143. The Supreme Court of Ohio has held that the defense of duress is an affirmative defense. State v. Robinson, 47 Ohio St. 2d, 103, 351 NE 2d 88, 92. Robinson, supra, further holds that the Defendant in an affirmative defense bears the burden of going forward with the evidence and has no burden of proof. To impose upon a Defendant the burden of proving an affirmative defense by a preponderance of the evidence must be deemed prejudicial. The Robinson, supra, decision was based on statutory law. The Federal Courts have deemed the placing of the burden on the Defendant as unconstitutional. Mullaney v. Wilbur, (1975) 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508.; Commonwealth v. O'Neal, 17 Cr.L. 2144, Mass.Sup.Jud.Ct. 4/18/75. The Supreme Court of Ohio has placed a different burden on the Defendant for an affirmative defense in a mitigation hearing than in a trial. "Appellant urges next that the testimony of the mitigation hearing pursuant to R.C. 2929.04(B) concerning duress, coupled with his low I.Q. should preclude the death penalty. He urges this Court to review the record pertaining to

duress in order to determine if the test of 'preponderance of the evidence' had been met. He then argues that once the element of duress has been presented 'the burden should be on the state to prove beyond a reasonable doubt that duress did not exist.' This conclusion is not within this court's reading of the statute which clearly speaks only of establishing by a preponderance of the evidence" any of the three mitigating circumstances. R.C. 2929.04(B), supra. State v. Royster,48 Ohio St. 2d 381, 385 NE 2d 616, 622. Thus, if a Defendant is facing mere incarceration in Ohio, he does not have the burden of proof in the affirmative defense of duress. However, when a Defendant is facing the death penalty, he must assume the burden of proof in the affirmative defense of duress. The twelve jurors are not permitted to consider the defense under any circumstances and only the sentencing judge decides the issue with the understanding that the burden is on the shoulders of the Defendant. For the courts to hold that it is unconstitutional to place a burden of proof upon a Defendant when mere incarceration is at stake but it is constitutional to place the burden of proof when his life is at stake, seems patently unfair and a violation of Jerome Royster's constitutional rights to due process and fair trial.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER'S EQUAL PROTECTION RIGHTS WERE VIOLATED WHEN THE TRIAL COURT DENIED APPELLANT'S REQUEST FOR NECESSARY FUNDS TO PAY EXPERT PSYCHIATRIC WITNESSES IN MITIGATION HEARING.

O.R.C. 2929.03(D) and (E) reads:
(D)
"When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation."

(E) "Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it

shall impose sentence of life imprisonment on the offender."

Thus, in Ohio, mitigation must be established by a preponderance of the evidence, and requires a psychiatric examination and report.

O.R.C. 2929.04(B) reads:

> "Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:
>
> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." (Emphasis added.)

Thus, in Ohio if a Defendant can prove that the offense was primarily the product of the offender's mental deficiency, the court is precluded from imposing the death sentence.

The Appellant requested that he be permitted to select his choice of psychiatrists to examine him and present the required psychiatric reports to the court. The petitioner was indigent and lacked sufficient money to employ said experts. The court appointed two psychiatrists, using the authority of O.R.C. 2947.06,(Note 1.), and refused to appoint the psychiatrist requested by the petitioner.

The petitioner maintained that this was a violation of his Equal Protection rights. Fifth and Fourteenth Amendments, United States Constitution. The majority of Federal and State case law appears to hold that the State does not have the duty by constitutional mandate to appoint an expert to assist a Defendant in a trial. 34 ALR 3rd, 1259, Indigent-Right to Appointed Expert. The Appellant respectfully urges this Honorable Court to find such an obligation when a person's life is at stake.

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Note 1./ The trial court may hear testimony of mitigation of a sentence at the term of conviction or plea, or at the next term. The prosecuting attorney may offer testimony on behalf of the state, to give the court a true understanding of the case. The court shall determine whether sentence ought immediately to be imposed or the defendant placed on probation. The court of its own motion may direct the department of probation of the county

wherein the defendant resides, or its own regular probation officer, to make such inquiries and reports as the court requires concerning the defendant, and such reports shall be confidential and need not be furnished to the defendant or his counsel or the prosecuting attorney unless the court, in its discretion, so orders.

The court may appoint not more than two psychologists or psychiatrists who shall make such reports concerning the defendant as the court requires for the purpose of determining the disposition of the case. Each such psychologist or psychiatrist shall receive a fee to be fixed by the court and taxed in the costs of the case. Such reports shall be made in writing, in open court, in the presence of the defendant, except in misdemeanor cases in which sentence may be pronounced in the absence of the defendant. A copy of each such report of a psychologist or psychiatrist may be furnished to the defendant, if present, who may examine the persons making the same, under oath, as to any matter or thing contained therein.

III. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER SECTIONS 2903.01, 2929.03 AND 2929.04 OF THE OHIO PENAL CODE PERMIT ARBITRARY IMPOSITION OF THE PUNISHMENT OF DEATH IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES.

In July of 1972 the Supreme Court of the United States held that the death penalty could not be imposed or carried out under statutory schemes which permit arbitrary, rare and discriminatory application. Furman v.Georgia 408 U.S. 38 (1972). Two of the five majority justices found the death penalty unconstitutional per se. The remaining three justices based their holdings upon the sentencing discretion conferred by the typical pre-Furman capital punishment statute and did not decide whether the removal of sentencing discretion, or the removal or control of discretion at other stages of the capital trial process, would sufficiently regularize the imposition of capital punishment to satisfy constitutional standards against arbitrariness, rarity and discrimination in infliction of the punishment of death.

By enactments effective January 1, 1974 the Ohio Legislature provided new capital punishment measures that defined a category of murder cases in which the penalty is potentially applicable that purport to regulate the process by which sentence is determined in cases of capital murder. But the conclusion is inescapable that, under this new legislation, the death penalty does and will continue to be imposed in an arbitrary, rare and discriminatory manner. It is, hence, unconstitutional under the terms of the Furman decision. (See Sections 2903.01, 2929.02, 2929.03, 2929.04 of the Ohio Revised Code.)

A close review of the aforementioned legislation indicates that persons who commit capital murder may be sentenced

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to death or life imprisonment depending upon the outcome of several decision-making processes. Some of these decisions are made on a discretionary basis. Others are made under the disguise of resolving subjective and conclusionary questions which function - and are intended to function - to mask the true, discretionary character of the decision-making.

Examples of this, under the new legislation, are the exercise of prosecutorial discretion, plea bargaining, jury discretion, and sentencing discretion. Although it is clear that Furman directed itself primarily to sentencing discretion, it is apparent that pre-sentence and post-sentence discretion can operate just as well to make the eventual imposition of capital punishment arbitrary and capricious. This decision has been reached in two states where courts have so held and have, therefore, invalidated supposedly mandatory death sentencing statutes on the authority of Furman. In Commonwealth v. A Juvenile (1973) Mass. Adv.Sh. 1199, 300 N.E. 2d 434 (1973), a death penalty imposed pursuant to a statute which required its imposition upon a conviction of a rape-murder was reversed because the trial judge had absolute discretion to avoid the penalty by proceeding against the Defendant under the Massachusetts Juvenile Offender Statutes. In New Mexico it was held in State v. Sanford (No. 24022 Cr., Bernalila County,) that a death penalty could not lawfully be imposed, even if it were mandatory upon conviction of first degree murder, if "indictment would allow the jury to choose between first or second degree murder" because the jury would thereby be "allowed to arbitrarily decide whether a defendant shall receive the death penalty by choosing either first or second degree murder."

Similarly, the Ohio legislation is defective for the reason that the legislation has failed even to make an attempt

to regulate discretion operating in an arbitrary manner and with equal or greater effect before and after the imposition of sentence.

As to prosecutorial discretion, "the prosecutor is the real arbiter of what laws shall be enforced and against whom, while the attention of the public is drawn rather to the small percentage of offenders who go through the courts." (National Commission on Law Observance and Enforcement, Report on Prosecution (1931). The impact of prosecutorial discretion on the administration of criminal justice is unbounded:

> " Whom he chooses to prsecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."
> (Note, Prosecutorial Discretion 21 DePaul L.Rev. 485, 486 (1971-1972).

Thus, without any legislative guidance whatsoever, a prosecutor may make case-by-case decisions as to whether an indictment will be sought for aggravated murder or for a lesser crime. Thus, since prosecutorial discretion is unlimited in Ohio there is no safeguard against the possibility that defendants will be charged with capital murder while other defendants, in identical or near identical factual situations, are charged with a lesser offense. (ORC. Section 309.08)

In addition, Sections 2929.03 and 2929.04 introduce an entirely new and equally unregulated level of prosecutorial discretion by providing that the death penalty may only be imposed if the prosecutor has chosen to specify in an indictment charging aggravated murder that one of the seven conditions enumerated in Section 2929.04 was present. Absent such a specification, no death sentence is possible regardless of the facts proved at trial; yet no rule of law and no amount of evidence places a prosecutor under any duty to allege or prove such a condition. It is, therefore, possible for a prosecutor

to try an alleged murderer for the highest degree of the crime, but to choose, for any reason at all, or for no reason at all, not to seek a death penalty.

Even if the initial charging discretion of prosecuting attorneys were somehow regularized, their power to avoid the death penalty by accepting a plea of guilty or no contest to a lesser included offense or to aggravated murder without specified aggravating circumstances would remain unchecked. See Rule 11(C)(4) of the Rules of Criminal Procedure which provide that"if the indictment contains one or more specifications, and a plea of guilty or no contest to the charges accepted, the Court may dismiss specifications and impose sentence accordingl in the interests of justice." The prosecutor and judge are thus given absolute discretion to avoid the death penalty since that penalty is prohibited in the absence of a plea or judicial finding of one or more specifications.Under 48 (A) of the Rules of Criminal Procedure the prosecuting attorney may exercise the same discretion by obtaining, with permission of the Court, a dismissal of all or part of the indictment. Thus, it becomes inevitable that in the absence of any standards which would prevent a prosecuting attorney from accepting a guilty plea to a lesser charge, some defendants indicted under the Ohio Capital Punishment Statutes will escape through plea-bargaining, the ultimate penalty of death. In the case at hand, in response to a question posed by the attorneys for the Defendant-Appellant, James O'Grady, chief trial counsel for the prosecutor's staff, admitted that discretion could exist, in fact, he stated that it has to exist. (T-48-49)

The third area where discretion is exercised is through the jury process. Juries have traditionally avoided the death

penalty by convicting defendants of lesser, rather than capital offenses. Indeed, American juries called upon to determine cases which the death penalty was mandatory upon conviction have frequently refused, despite strong evidence of guilt, to return a guilty verdict with regard to the capital offense. See McGautha v. California 402 U.S. 183, at 199 (1971), and authorities cited therein. The new death penalty provisions of the Ohio Criminal Code do nothing to regularize pre-existing jury discretion to convict a capital defendant of a lesser offense. Moreover, they offer the jury the additional opportunity to avoid the death penalty by finding the defendant guilty of aggravated murder but failing to find that the offense involved, a specified aggravating condition.

Any of seven circumstances will, if found by the jury to have existed beyond a reasonable doubt, serve to elevate a crime from the category of simple aggravated murder (carrying a maximum penalty of life imprisonment) to the category of capital murder (punishable by life imprisonment or death). These seven circumstances are decidedly more susceptible of objective determination than the mitigating circumstances enumerated in Section 2929.04(B), yet each is an invitation to a jury opposed to the execution of the defendant before it to remove the capital punishment alternative by failing to find the presence of a specified aggravating circumstance.

This new opportunity for discretion embellishes a system in which the opportunity of convicting a capital defendant of a lesser offense is clearly available (R.C. Section 2945.74).

The last area of discretion to be discussed and the plainest result of Furman is that sentencing discretion may no be exercised to impose the death penalty upon some, but not all persons found to have committed capital crimes. The post-Furman

Ohio statutes provide that even after a defendant found to have commited an aggravated murder under one of the seven conditions specified as prerequisite to the imposition of the death penalty, the trial judge may sentence him to death or to life imprisonment depending upon a determination of three highly subjective questions of degree, none of which can be precisely proven. These mitigating circumstances as they are called, are so imprecise that they assure absolute sentencing discretion by providing a rationale for the choice of either sentencing alternative in almost any capital case.

In Gregg v. Georgia, 44 U.S.L.W. 5230 (July 2, 1976); Proffitt v. Florida, 44 U.S.L.W. 5256 (July 2, 1976); Jurek v. Texas, 44 U.S.L.W. 5262 (July 2, 1976); Woodson v. North Carolina, 44 U.S.L.W. 5267 (July 2, 1976; and Roberts v. Louisiana, 44 U.S.L.W. 5281 (July 2, 1976), the Supreme Court of the United States considered the per se constitutionality of capital punishment and decided that "the punishment of death does not invariably violate the Constitution," Gregg v. Georgia, supra, 44 U.S.L.W. at 5234. In so doing, it rejected petitioners' contention that support for the death penalty had so dwindled that its imposition in a predictably small number of scattered cases would be an impermissible cruelty. The Court acknowledged that "under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first-degree murderers," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5272, and held that, even where the death penalty was limited to a narrower category of homicides, its across the board imposition, without regard for "the circumstances of the particular offense and the character and propensities of the offender" involved "harshness and inflexibility," Roberts v. Louisiana, supra, 44 U.S.L.W. at 5283, that were inconsistent with contemporary moralty as evidenced by legislative enactments and the behavior of capital juries. But it took the position that where the attention of the sentencing body is focused upon both aggravating

and mitigating factors, and where appellate review of capital sentences is available as an assurance against disproportionality, Gregg v. Georgia, supra, 44 U.S.L.W. at 5243, see also Proffitt v. Florida, supra, 44 U.S.L.W. at 5259; Jurek v. Texas, supra, 44 U.S.L.W. at 5266, a "'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not,'" -- a factor found decisively lacking in Furman v. Georgia, 408 U.S. 238 (1972) -- would be achieved. Gregg v. Georgia, supra, 44 U.S.L.W. at 5243.

The decisions in Gregg, et al. rest, then, on the assumptions that (1) contemporary levels of support for the death penalty are not so low that its use will be necessarily aberrational, and (2) as standards of decency evolve, legislative patterns permitting or mandating lesser penalties in formerly capital cases and patterns of jury behavior in capital cases will emerge, providing rational bases for identifying systems that are excessively rigid and sentences that are disproportionately harsh.

Furman v. Georgia, due to its complexity, has been applied in Ohio capital cases to severely limit mitigating circumstances. These rigid features of the Ohio Statute are clearly inconsistent with legislative will and therefore are in violation of the constitutional rationale of Gregg, et.al.

Woodson v. North Carolina, supra, and Roberts v. Louisiana, supra, hold that contemporary standards of decency, incorporated in the Eighth Amendment, require "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death" and forbid "treat[ing] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death," Woodson v. North Carolina, supra, 44 U.S.L.W. at 5274. Moreover, they

establish that recent legislative enactments of statutes allowing rigid, automatic application of the death penalty reflect "attempts by the States to retain the death penalty in a form consistent with the Constitution," rather than "a renewed societal acceptance" of Draconian infliction capital punishment.

Examination of the Ohio death penalty statutes and the history of their enactment establishes that they, like the statutes invalidated in Woodson and Roberts, are more rigid than contemporary standards of decency can condone and reflective, not of the will of the people of the State of Ohio as expressed through its legislature, but of a compromise between humane policy concerns and the supposed requirements of Furman.

Following Furman, 21 of 35 states that enacted new sentencing provisions made death the mandatory consequence of a finding that a defendant was guilty of certain criminal conduct. The federal government and 11 states enacted statutes following the example of the Model Penal Code of 1962 in that they directed consideration of aggravating and mitigating circumstances in the process of determining sentence in a capital case. These twelve jurisdictions, finding the mandatory scheme too harsh, choose to focus sentencing deliverations upon a broad range of mitigating factors. The mitigating factors considered in the sentencing process in these twelve jurisdictions invariably include, as they must, in light of the Woodson and Roberts holdings, factors having to do with "the character and record" of the defendant whose life is at stake. In the herein case, it is particularly significant that the Appellant is an acknowledged sociopath and of sub-standard intelligence.

establish that recent legislative enactments of statutes allowing rigid, automatic application of the death penalty reflect "attempts by the States to retain the death penalty in a form consistent with the Constitution," rather than "a renewed societal acceptance" of Draconian infliction capital punishment.

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In Alabama, Arkansas, Florida and Nebraska, a broad range of mental and emotional disburbance may be considered as a mitigating factor. Ala. H.B. 212 Sec. 7 (b); Ark. Code §41-4712 (a); Fla. Stat. Ann. §921.141(7)(b); Neb. Rev. Stat. §§92-2523 (2)(b) and (c). And limitations in the capacity of the defendant to regulate or appreciate the wrongfulness of his conduct are mitigating in Alabama, Arizona, Arkansas, Connecticut, Florida and Nebraska and in Federal jurisdictions and preclude imposition of a death sentence in Colorado. In Ohio, sentencing determinations in capital cases were taken from the jury and all mitigating factors having to do with the character and background of the offender were eliminated, save one:

> "The offense was primarily the product of the offender's psychosis or mental deficiency....."

Ohio Rev. Code §2929.04 (B)(3). The terms "psychosis" and"mental deficiency" designate narrow categories of mental illness and exclude most recognized mental and emotional disturbances. This rigid standard violates the principals that not "every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender," see Roberts v. Louisiana, and that "individual culpability is not always measured by the category of crime committed," and thus infringes the constitutions of the United States and the State of Ohio. Since mitigating evidence is irrelevant to the Ohio sentencing determination, except as it establishes the inducement, duress, cohersion, strong provocation or causily related psychosis or mental deficiency that must be found to have inhered in the crime before a defendant may be spared, and since there is no mitigating factor that looks exclusively to the propensities and redeemability of the individual offender, the Ohio statute precludes the independent "consideration of the character and record of the individual" that is "a constitutionally indispensable part of the process of inflicting the penalty of death, "Woodson v. North

Carolina, 44 U.S.L.W. at 5275.

The Ohio Death Penalty statutes violate the sixth, eighth and fourteenth amendments in that they deny the capitally accused the right to a judgment of his peers as to the existence of mitigating circumstances, and the appropriateness of the penalty of death. Prior to Furman v. Georgia, 408 U.S. 238 (1972), it was almost universal in America that "infliction of the death penalty" be put "in the hands of the jury, rather than the judge." McElroy v. United States, 361 U.S. 249, 255 (1960) In fact,"except for four States that entirely abolished capital punishment in the middle of the last century, every American jurisdiction has at some time authorized jury sentencing in capital cases." McGautha v. California, 402 U.S. 183, 200 n. 11 (1971).

In Ohio, jury discrection in capital sentencing prevailed from 1898 without interruption until the death penalty statutes of this state were invalidated in 1972. This undoubtedly was the result of language in Furman ruling that unbridled jury discretion to impose a death sentence was constitutionally prohibited and the opinion of the Supreme Court in McGautha, that the formulation of standards to guide juries in capital sentencing process was impossible.

The United States Supreme Court has not conceded that "McGautha's assumption that it is not possible to devise standards to guide and regularized jury sentencing in capital cases has been undermined by subsequent experience." Gregg v. Georgia 44 U.S.L.W. 5230, 5242 (1976).

Although it may be permissable to permit trial judges to reduce death sentences imposed under the influence of passion or prejudice or against the weight of aggravating and mitigating evidence, the imposition of a death penalty under a procedure which affords no opportunity for meaningful jury input is, on

three independent grounds, violative of the Ohio and Federal constitutions. First, the principle that Death Sentences may only be imposed by a jury is fundamental to our jurisprudence and an essential assurance against disproportionality and excessiveness in capital sentencing. Second, the failure to provide for jury input in the capital sentencing process will result in the impermissably arbitrary imposition of the death penalty. Third, findings regarding the presence or absence of mitigating circumstances are findings of fact as to which a defendant has a Sixth Amendment right to a trial by jury.

The final argument to be asserted by the Defendant-Appellant as to the unconstitutionality of the death penalty is that to execute a juvenile is cruel and unusual punishment as prohibited in the Eighth Amendment of the United States Constitution. The landmark case of Jordan v. Fitzharris 257 Fed. Supp. (1964), lists among other things that a punishment is cruel and unusual when, although applied in pursuit of a legitimate penal aim, it goes beyond what is necessary to achieve that aim. Further, a punishment is unnecessarily cruel when it goes beyond the purpose for which it is used. In People v. Mosely, 15 Crim.Law, 2503, a recent New York State decision, the life sentence of a person convicted of selling narcotics was reversed as cruel and unusual punishment based upon a comparison with the punishments accorded similar crimes in other jurisdictions and the recommended penalty of model legislation. Following this decision, this Court is respectfully requested to compare the pertinent Ohio Statutes to those of New York, California, Rhode Island and Massachusetts. The Massachusetts Court, in Commonwealth v. A Juvenile, supra, holds that although the crime was heinous, the court could not execute since the accused was a juvenile when the crime was committed. The factual situation in this particular case is not unlike the one

posed in State v. Harris. The Massachusetts case also involves a juvenile felon whose initial hearing was before a juvenile court judge. The lower court in the instant case ruled that the juvenile court judges' discretion is sufficiently regulated as to render it acceptable under the terms of Furman. We ask this Court to review the Massachusetts case herein cited to suggest that the lower court's conclusion is not supported in law.

In the foregoing we have shown that the new capital sentencing procedure created by the new Ohio Legislature creates the jury selectivity which is condemned by Furman v. Georgia. Even if this were not so, the Eighth Amendment would prohibit Defendant-Appellant's death sentence, for today the death penalty, in any form, is inconsistent with the self-respect of a civilized people.

The Eighth Amendment is not static, and the prohibitions of the cruel and unusual punishment clause are not "confined to such penalties and punishments as were inflicted by the Stuarts. Weems vs. United States 217 U.S., 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." id at 378, and informed by "the light of contemporary human knowledge." Robinson vs. California 370 U.S. 660, 666 (1962). The penalty of death is, for three principal reasons, unjustifiable in terms of contemporary knowledge and standards of decency.

FIRST: The cruelty of the death penalty is apparent in an age when "contemporary human knowledge" draws upon advance medical science and sciences of human behavior. We are no longer so naive as to the workings of anti-social behavior as to uphold the simplistic notion that the threat of death deters crime. e.g. Sellin, Capital Punishment (1967) 135-186, 244-253;

Mattick, The Unexamined Death (1966) 28-80; Bedau, The Death Penalty in America, Rev.ed 1967 214, 258-343, Royal Commission on Capital Punishment, 1949-1953 Report (H.M.S.O., 1953) at 18-24, 58-59, 328-380; President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967) 143.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, to reinforce moral standards or, if retribution is considered a legitimate aim of penal sanction to exact a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human-life." Black, Crisis in Capital Punishment, 31 MD.L.Rev. 289-291 (1971) The death penalty is not consistent with any "standards of decency that our society can forthrightly accept." See Trop v. Dulles, 356 U.S. 86, 100 (1958).

SECOND: The death penalty should be repudiated because of its irregular and rare use. "The most salient characteristic of capital punishment is that it is infrequently applied... All available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." President's Commission on Law Enforcement and Administration of Justice, Report (The Challenge of Crime in a Free Society) (1967), p. 143. No man or woman has been executed in the United States of America since 1967.

The Furman majority looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "the objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U.S. at 300.

THIRD: The last and most obvious argument to be propounded against the application of the death penalty as violative of the Eighth Amendment of the United States Constitution is well stated in People v. Anderson, 6 CAL 3rd, 628, 493, P. 2d 880, 894 (1972). In this case it was pointed out, that "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture. It is plain that the prisoner, even more than the ex-patriot, is subjected to 'a fate of ever-increasing fear and distress.'" Trop v. Dulles, 356 U.S. 86, 102 (1958). The stress of awaiting execution frequently produces insanity; see Solesbee v. Balcome, 339 U.S. 914 (1950), or other extreme manifestations of psychological complications.

To summarize, the moral development which has accompanied advances in understanding the causes of crime and which is mirroed in the world-wide reluctance to impose the ultimate penalty, forbids its continued approval by courts constrained to maintain "the evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958).

## CONCLUSION

Petitioner prays that a Writ of Certiorari be granted.

Respectfully submitted,

TIMOTHY D. GERRITY
88 East Broad Street
Columbus, Ohio 43215

MYRON SHWARTZ
50 West Broad Street
Columbus, Ohio 43215

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Ohio was served upon George C. Smith, Franklin County Prosecutor's Office, 369 S. High Street, Columbus, Ohio 43215, by ordinary U.S. mail this _____day of June, 1977.

TIMOTHY D. GERRITY
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THE STATE OF OHIO, APPELLEE, v. [illegible] ROYSTER, APPELLANT.

[Cite as State v. Royster (1976), 48 Ohio St. 2d .]

*Criminal law—Aggravated murder—Imposition of death penalty—Criteria—Established, how—Burden of proof—Constitutionality—Evidence.*

1. Ohio's statutory framework for the imposition of capital punishment is a valid constitutional enactment of law and does not violate the Constitution of the United States or that of the state of Ohio. (*State* v. *Bayless*, 48 Ohio St. 2d 73, approved and followed.)
2. R. C. 2929.04(B) requires that one or more of the three mitigating circumstances enunciated therein be established by a preponderance of the evidence.

(No. 75-975—Decided , 1976.)

APPEAL from the Court of Appeals for Franklin County.

On May 8, 1974, at approximately 11:00 p. m., the victim, Mrs. Jeannette Nichols, was parking her 1972 Ford automobile in the lot at St. Anthony's Hospital in Columbus, Ohio, where she was employed as head nurse in the emergency room.

As she was getting out of the car four men approached her, Jerome Royster (appellant herein), John William Harris, Eric Maurice and Clarence Smith, one of whom brandished a sawed-off shotgun and demanded her keys. She was then forced into the back seat of her car and driven to the home of Harris where she was subjected to a series of sexual assaults which occurred in Harris' home, and later in a nearby garage, and was participated in by the four men and a fifth man, Baxter Martin. During the encounter it was discovered that Mrs. Nichols knew the name and address of Harris. She was placed in the trunk of her automobile while her fate was argued by her assailants. Their verdict called for her death. Appellant and Harris took the victim's car to a field near Maryland Avenue and Sunbury Road where she was apparently forced to lie down. Harris shot her twice in the head with a .20 gauge shotgun which the appellant had taken from his father's house. Appellant acted as a lookout during the shooting, and afterward the men covered the body with an old couch.

When Mrs. Nichols had left her home for work that evening, she had with her a purse containing several credit cards, a watch and a diamond engagement ring, a portable radio, an automatic garage door opener and her vehicle contained a bumper jack, all of which were recovered or accounted for later.

On Friday, May 10, 1974, the appellant, Harris, Smith

and Maurice were driven to Philadelphia, Pennsylvania, to the home of a relative of the appellant. They had spent the two previous days hiding in the home of Smith's girl friend. Their driver testified that, during the trip to Philadelphia, appellant had stated that he and John Harris had shot a nurse. The driver on returning to Columbus contacted the police and reported what he had done and heard.

Early on May 14, 1974, the Philadelphia police arrested appellant, Harris, Smith and Maurice near the home of appellant's cousin, and they were later returned to Columbus. Appellant was indicted on two counts of aggravated murder with specifications, kidnapping, rape, aggravated robbery and grand theft.

On December 9, 1974, the case went to trial before a jury. Eleven witnesses testified for the prosecution and the testimony of several other witnesses was admitted by stipulation. Most of the physical evidence was also received by stipulation. The appellant did not testify before the jury. On December 14, 1974, the jury returned a verdict finding the appellant guilty of aggravated murder without specifications on count one, guilty of aggravated murder with specifications on count two, guilty of kidnapping on count three, guilty of rape on count four, guilty of aggravated robbery on count five, and guilty of grand theft on count six.

The physical evidence was impressive. A brassiere and girdle of the brand, type and size worn by Mrs. Nichols was recovered from Harris' bedroom. A sheet of fiberboard from the garage next to Harris' home contained the same kind of fibers found on the victim's clothing. Human hair found near the fiberboard was microscopically examined and found to be identical with samples of the decedent's pubic hair. The automatic garage door opener, two bumper jacks and a plastic bag were recovered from the car of Baxter Martin who was also discovered using one of the victim's credit cards. Teeth marks in the plastic bag were compared with dental impressions of Mrs. Nichols and found to be identical. The Telectron automatic garage door opener was positively identified as belonging to the victim. Tests were made on the bumper jack, disclosing certain marks identical with those found on a chrome strip taken from the recovered vehicle of the victim. The two wheels from the vehicle sold by Martin were recovered, and certain other credit cards belonging to the victim were found in Martin's home. Semen was identified on swabs taken

from the victim's mouth, rectum and vagina. Microscopic analysis of the vaginal swab showed type A B antigens. Appellant and Smith had A B type blood while Harris and Maurice had type O blood as did the victim and her husband. Type O blood does not contain A or B antigens. It was stipulated that both appellant and Smith were "secretters" whose blood type antigen is found in all body secretions.

A more lengthy disquisition of the total evidence would be monumental, and reviewed would serve no purpose here.

A mitigation hearing was held on March 24, 1975. The court found from the evidence presented at the hearing that none of the mitigating circumstances set forth in R. C. 2929.04 was established, and sentenced the appellant to death as required by law.

The Court of Appeals affirmed the judgment of conviction and the sentence, and the cause is now before this court pursuant to an appeal as a matter of right.

*Mr. George C. Smith*, prosecuting attorney, and *Mr. Alan C. Travis*, for appellee.

*Mr. Myron Shwartz* and *Mr. Timothy D. Gerrity*, for appellant.

CELEBREZZE, J. Appellant's threshhold argument concerns itself with the constitutional validity of the Ohio statutes which culminate with the application of the death penalty in certain aggravated murders, particularly the one at issue here. He contends that the case of *Furman* v. *Georgia* (1972), 408 U. S. 238, held that the death penalty could not be imposed under a statutory scheme which permits arbitrary, rare and discriminatory application. Appellant contends that the trial court committed error by refusing to strike the specifications of aggravation in the first instance, and, after the conviction and mitigation hearing, to limit its sentence to life imprisonment. He further singles out the language of Justice Brennan, at page 291, in the *Furman per curiam* opinion, that capital punishment is "uniquely degrading to human dignity" and is therefore violative of the Eighth Amendment to the United States Constitution. Appellee notes that only one other justice concurred in this view which hardly makes it binding on state courts.

Subsequent to the decision in *Furman*, the Ohio General Assembly enacted R. C. 2903.01, 2929.02, 2929.03, 2929.04 and 2941.14, which provide for a death penalty under certain circumstances, but are specifically designed to remove the uncontrolled or arbitrary sentencing discretion rejected in *Furman*. We deem it sufficient to state herein that the death penalty imposed under the Ohio controlled statutory mandates is not violative of the Eight Amendment nor does it fall within the unfettered sentencing discretion barely condemned in *Furman*. (See *State* v. *Bayless* [1976], 48 Ohio St. 2d 73.)

Appellant argues that the language set forth in R. C. 2929.04(B) provides for merely another formula by which the sentencing may arbitrarily impose the unwarranted death penalty.

R. C. 2929.04, as pertinent, reads as follows:

"(B) Regardless of whether one or more of the ag-

gravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence [preponderance] of the evidence:

"(1) The victim of the offense induced or facilitated it.

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

It is important to note that the above statute explicitly states that the death penalty is "precluded when" the presence of any one of the conditions cited in paragraphs (1), (2) and (3) is found by a preponderance of the evidence at a separate hearing specifically held for that purpose. The validity of this section has also been passed on in *State* v. *Bayless, supra.*

The record does not disclose that paragraph (1) was involved herein. Appellant, however, did attempt to exploit the conditions set forth in paragraphs (2) and (3). At this time we would only observe that a thorough review of the trial record and mitigation hearing fails to establish that appellant was under "duress, coercion, or strong provocation." To the contrary, while Maurice and Smith protested the decision to kill Mrs. Nichols, and indeed were not present at her execution, appellant *was* present, *did* provide the death weapon by personally taking it from his father's home, and *aided* the triggerman, Harris, in attempting to conceal the body. Appellant's fingerprint was clearly identified as being present on the weapon.

Nor could any amount of cross-examination shake the conclusions of the psychiatrists, Dr. Leuchter and Dr. Stevenson, that the appellant was not mentally deficient.

Appellant contends next that his right to contact counsel, under R. C. 2935.14 and 2935.20, was not afforded by the police.

The pertinent part of R. C. 2935.14 is as follows:

"If the person arrested is unable to offer sufficient bail or, if the offense charged be a felony, he shall, prior to being confined or removed from the county of arrest, as the case may be, be speedily permitted facilities to communicate with an attorney at law of his own choice, or to communicate with at least one relative or other person for the purpose of obtaining counsel * * *."

R. C. 2935.20 states, in part:

"After the arrest, detention, or any other taking into custody of a person, with or without a warrant, such person shall be permitted forthwith facilities to communicate with an attorney at law of his choice who is entitled to practice in the courts of this state, or to communicate with any other person of his choice for the purpose of obtaining counsel. Such communication may be made by a reasonable number of telephone calls or in any other reasonable manner. * * * No officer or any other agent of this state shall prevent, attempt to prevent, or advise such person against the communication, visit, or consultation provided for by this section."

The record sufficiently repudiates this contention. The appellant was arrested and taken to the police administration building in Philadelphia at approximately 12:00 a. m., on May 14, 1974. Detective Michael Gannon of the Philadelphia Police Department testified that at about 1:30 a. m., the same day, he saw appellant in the interrogation room and told him that the telephones were available for his use. Detective Gannon also testified that he first advised appellant of his rights and that he was advised of these same rights later. The record does not disclose whether anyone offered to make a telephone call for the appellant. His counsel argues that *State* v. *Jones* (1974), 37 Ohio St. 2d 21, applies to this case. In that case, the detective who interviewed the accused therein could not remember if he had offered the use of a telephone. That is not the situation here.

Having scrutinized the record, we are satisfied that appellant was offered the use of the telephones. Although not disputing counsel's contention that he had previously advised appellant to call when he was arrested, we conclude that for whatever reason, appellant chose not to avail himself of this advice.

Counsel argues next that appellant's confession was improperly obtained for the following five reasons:

First, the Philadelphia police did not comply with counsel's request that counsel be notified prior to any questioning of appellant. The record discloses that it was stipulated that if counsel were to testify, then he would say that he had telephoned the Supervisor of the Homicide Division of the Philadelphia Police Department, name unknown, and requested that he be called when appellant was arrested. However, there is no evidence that any of the the police officers involved herein were aware of any contact between defense counsel and person(s) unknown at the Philadelphia Police Department. Appellant attempts to draw a parallel between this case and *Darwin* v. *Connecticut* (1968), 391 U. S. 346. A review of that decision shows that it is obtuse to the facts herein.

Second, that the confession was obtained by actual physical force. The appellant testified, on *voir dire*, that he was taken to a Philadelphia police station where he was beaten while his hands were handcuffed to a bar between his legs. He said he was told he could not call his attorney until he signed "these statements" and/or "these papers." He refused and was hit again. He says he then signed the papers.

The record reveals that appellant's aunt, Hattie Thompson, and his cousin, Hezekiah Thompson, witnessed the arrest. They agreed there was no "pushing or shoving" and "no one had no beating at all." Detective Martin Buck of the Philadelphia Police Department, the arresting officer,

testified that there were no threats, beatings or other abuse. Detective Buck saw appellant again at 1:30 a. m., on May 14th, and saw no evidence of any mistreatment, nor did appellant complain of any. Detective Gannon testified he advised appellant of his rights and of the availability of telephones and stated he saw no evidence of mistreatment and that the appellant complained of none. Detective Tom Jones of the Columbus Police Department testified that he saw appellant at 3:15 a. m., later that day, and remained with him for almost an hour questioning him, and that he observed no evidence of any beating nor did he in any way threaten or harass the appellant.

The following day, May 15, 1974, appellant appeared before a municipal judge in Philadelphia for an extradition hearing. He had no cuts or bruises, nor did he complain to the court of any mistreatment.

Third, counsel argues, appellant was not clearly advised of his right to use the telephone. We have previously discussed this contention and would only reiterate our conclusion.

Fourth, appellant contends he was not sufficiently warned of his right to counsel resulting in an inability on his part to understand the consequences of his waiver. The record discloses, however, that Detective Gannon warned him of his rights, as did Detective Jones, on at least two occasions and that he gave the waiver form to appellant to read before he signed it. Prior to appellant's signing, he was asked by Detective Jones if he understood and could read and write and he said he did and signed.

Fifth, and last, the appellant claims he did not possess the mental acuity and capacity to make the decision to waive his rights. Counsel maintains that because of appellant's low level of educational achievement and reading comprehension he could not knowingly and intelligently waive his rights. A reading of the record discloses the contrary conclusion. The testimony of the appellant reveals an ability to understand and to respond fluidly to questioning. It is not marked by any stumbling or stammering or inability to comprehend. It is further difficult to understand the motive of his counsel in advising him on the telephone prior to his arrest to some extent of his rights if counsel, who knew appellant prior to this incident, did not have confidence in appellant's comprehension.



While the explanation of rights and their waiver must be weighed with the individual's intellectual capacity, the totality of the evidence in this case supports the trial court's judgment that the statement was properly admitted. The record discloses an uncomplicated explanation of rights in language appellant acknowledged he understood.

Appellant urges next that the testimony at the mitigation hearing pursuant to R. C. 2929.04(B), concerning duress, coupled with his low I. Q., should preclude the death penalty. He urges this court to review the record pertaining to duress in order to determine if the test of "preponderance of the evidence" had been met. He then argues that once the element of duress has been presented, "the burden should be on the state to prove beyond a reasonable doubt that duress did not exist." This conclusion is not within this court's reading of the statute which clearly speaks only of establishing by a "preponderance of the evidence" any one of the three mitigating circumstances. R. C. 2929.04(B), *supra*.

The record at the mitigation hearing shows the appellant had an I. Q. of 75 in 1962; 61 in 1966; and 54 in 1968. However, the testimony of the psychiatrists did not equate I. Q. with mental deficiency. Dr. Henry Leuchter, rather, related the decrease in appellant's scores to developing characteristic traits and his unwillingness to cooperate with the examiner. The doctor was most positive in his conclusion that the appellant was not mentally deficient. This coincides with the testimony of Dr. Robert B. Stevenson. We can find no evidence that the offense was the product of a "psychosis or mental deficiency."

Finally, appellant argues that the trial court erred in denying his request for additional experts at state expense.

R. C. 2929.03 provides, in pertinent part:

"(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to Section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation."

Pursuant to the above, and in compliance with R. C. 2947.06 contained therein, the trial court appointed two psychiatrists to examine appellant, report their findings and appear to testify at a mitigation hearing. They were witnesses of the court, not the state or the appellant, and received a fee fixed by court order.

R. C. 2947.06 limits the authority of the court to "not

more than two" in making the appointment of either psychologists or psychiatrists. The appellant makes no complaint of incompetency, bias or prejudice on the part of the two appointees. His complaint is only that he wished to have his expenses for those he privately employed.

It should be noted that the state offered to stipulate any findings that appellant had to offer along these lines and the court did, in fact, receive reports from two of the appellant's experts.

Appellant contends next that due to his economic condition he was denied equal protection of the law. It is obvious from a reading of the statute that this contention is misplaced. The General Assembly, in limiting to two the number of psychologists or psychiatrists the court might appoint, also limited the expert testimony of this nature the court might consider. The statute provides, in effect, that all, including appellant, are entitled to only two witnesses of this category. We are unable to agree that the trial court either abused its discretion or denied any right, including that of equal protection, to the appellant.

The judgment of the Court of Appeals is affirmed.

*Judgment affirmed.*

O'Neill, C. J., Herbert, Corrigan, Stern, W. Brown and P. Brown, JJ., concur.